

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Petition for Rulemaking to Amend)	
47 CFR 76.64, 76.93, and 76.103)	RM-11203
)	
Retransmission Consent,)	
Network Non-Duplication)	
And Syndicated Exclusivity)	

COMMENTS OF MILLENNIUM DIGITAL MEDIA SYSTEMS, L.L.C.

Millennium Digital Media Systems, L.L.C. files these comments in support of the American Cable Association's Petition for Rulemaking¹ requesting minor changes to the Commission's retransmission consent, network non-duplication and syndicated exclusivity rules. Millennium Digital Media is a small, minority owned and operated cable television company serving approximately 125,000 subscribers in over 135 franchise areas, the majority of which are in rural Washington, Oregon and Michigan. Millennium's systems are similar to that of the hundreds of other small independent cable operators in America. Our operations include 23 stand alone systems serving fewer than 1,000 subscribers including 4 serving fewer than 50 subscribers. Millennium is a member of the American Cable

¹ Petition for Rulemaking, In the Matter of Petition for Rulemaking to Amend 47 CFR 76.64, 76.93 and 76.103 Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity filed March 7, 2005 by the American Cable Association (hereinafter "ACA Petition").

Association, the National Cable Television Cooperative and the National Cable Television Association and has Senior Executives serving on the Board of Directors of each organization.

I. BROADCASTERS' ESCALATING DEMANDS FOR HIGHER RETRANSMISSION CONSENT FEES FROM SMALLER CABLE COMPANIES REQUIRE ADJUSTMENTS TO THE EXCLUSIVITY REGULATIONS.

The most critical issue facing Millennium's operations, along with competition from the DBS providers, is the rising cost of programming and the direct impact it has on our customers. The rise in programming rates in recent years has been well documented, both before Congress and at the Commission. Millennium works diligently, both through the National Cable Television Cooperative and with the programmers directly, attempting to keep cable programming increases at a minimum, admittedly with limited success. In negotiating with the cable programmers Millennium relies on the availability of alternative networks--the fact that there are multiple niche cable programmers (i.e. outdoor, cartoon, classic movie, etc) helps, in a small way, to keep rate increases in check. Suffice to say; what little negotiating power Millennium and other small cable providers have in dealing with the cable programmers is based on the availability of lower cost substitute channels. While other factors such as the tying and bundling of affiliated programming work to dilute, sometimes significantly, the alternate choice

option that otherwise characterizes a true competitive market, Millennium realizes that such matters are not at issue in this proceeding.

At issue in this proceeding is another source of significantly higher basic cable rates, the proliferation of sharply escalating cash demands for retransmission consent, combined with the use of exclusivity regulations to eliminate lower cost alternatives. As explained in the ACA Petition, the current network non-duplication rules and syndication rules (collectively the “Exclusivity Rules”), which were originally promulgated in 1966 & 1972 respectively, are being used to eliminate price competition in retransmission consent negotiations with smaller cable operators.²

As explained in the ACA Petition, the Commission’s intent in promulgating the Exclusivity Rules had nothing to do with assuring an extra source of income for broadcast stations. As the ACA Petition notes, the Commission has repeatedly stated that the Exclusivity Rules were never intended as a means to increase station or network profits.³ In fact, retransmission consent was not adopted until the 1992 Cable Act—26 years after the original adoption of the network non-duplication rules. In adopting the retransmission consent rules Congress obviously had the opportunity to memorialize and transform the Commission’s Exclusivity Rules into statute, but did not do so, instead leaving them only as regulations, subject to change by the Commission from which they were promulgated. As the ACA Petition

² ACA Petition, pp. 6-17.

³ ACA Petition, pp. 6-13.

explains, changes in the industry and market conditions since 1992, including but not limited to media consolidation, warrant the small changes requested in the ACA Petition.⁴

As noted in the ACA Petition, network owners, media conglomerates and affiliate groups have made it clear that in this fall's upcoming round of retransmission consent they will demand substantial per subscriber fees.⁵ Disney/ABC has argued to the Commission that the average "value" of its owned and operated stations was reportedly \$2.00 to \$2.09 a month "well in excess of the cash price of .70-.80 cents currently offered by ABC to MVPDs".⁶ NBC, CBS and Fox perceive their value as at least similar to ABC, if not greater. Thus, the self-perceived "value" of the Big 4 broadcast networks would add between \$8.00 to \$8.36 per month to each subscriber's cable bill or, using the price Disney/ABC said they were willing to "offer", at least an additional \$2.80 to \$3.20 per month to each subscribers bill. With no other alternative for the cable operator, due to the Exclusivity Rules, it is only a matter of time before the price demanded from smaller cable operator escalates from the .70 to .80 cent "offer" quoted in regulatory filings to the

⁴ ACA Petition, pp. 18-25.

⁵ ACA Petition, p. 24.

⁶ Federal Communication Commission, *Report on the Packaging and Sale of Video Programming Services to the Public*, provided to the Committee on Energy and Commerce, United States House of Representatives, November 18, 2004.

self-perceived “value” of \$2.00-2.09 per subscriber per month for each of the Big Four network providers.⁷

Adding an additional \$2.80 to \$3.20 a month to each of our subscribers’ bills will harm consumers and hurt our ability to compete. As noted before, when programmers request price increases from our subscribers which we feel are not justified, Millennium looks for comparable, alternative programming options to either replace or at least restrain, via the threat of replacement, such increases. In the case of retransmission consent, the Exclusivity Rules preclude us from protecting our customers in this manner.

For this reason, Millennium strongly supports the granting of ACA’s Petition. The relief requested by the Petition is narrowly drawn, within the Commission’s power to grant and is meant only to avoid the misuse of the Exclusivity Rules to raise the cost of basic cable. The Petition is not requesting an elimination of the Exclusivity Rules—a station owner wanting to protect its exclusivity rights can always choose “must carry” thus assuring that it will be the only station carrying its affiliated programming. Nor is the Petition requesting a prohibition on additional cash payments or other consideration for retransmission consent—rather it is requesting that the price demanded be market tested. The Petition merely requests the Commission to remove current impediments to marketplace pricing for

⁷ As noted, such an increase would add \$8.00-\$8.36 per month to each subscriber’s bill.

retransmission consent and only in cases involving smaller cable companies, those companies most vulnerable to broadcasters' foreclosure strategies. In simplest terms, the changes proposed by ACA will let the market determine the "price" of the broadcast signal by allowing the cable operator to negotiate with the next station owner down the road.

Millennium's strong support for the relief requested by the Petition is premised in Millennium's experience when alternative broadcast networks are available. Millennium's primary system in Michigan crosses three DMA's. In the last round of retransmission consent negotiations Millennium was negotiating with a network owned and operated ("O&O") broadcast station for retransmission consent needed for approximately 1000 subscribers. The demands requested of Millennium were similar to those documented by others before Congress and the Commission, launches of affiliate programming in Millennium's other regions to a number of subscribers far in excess of what was needed in Michigan, or, in the alternative, a per subscriber per month cash payment in the range quoted above. The communities for which retransmission consent was desired however happened to be within one of the limited exceptions to the Exclusivity Rules; the communities were located within the 35 mile "specified zone" of another broadcast station for the same network and thus one station could not claim a superseding right under the Exclusivity Rules over the

other.⁸ In negotiating with the O & O station, when Millennium indicated that a lower cost alternative existed, the “price” demanded by the O&O station was reduced. Consistent with any other commercial transaction the availability of a comparable product or service had a definite impact on the negotiations to help restrain the “price” demanded.

Further, broadcaster concerns that there will be a large scale “importation” of distant signals from far away if the Exclusivity Rules are modified in any manner are greatly exaggerated. In analyzing its options in the above described scenario, Millennium realized how difficult it is to reach a decision to drop a within DMA broadcast channel, even when the substitute station was within 35 miles of the affected communities. Like the thousand plus other small independent cable providers, Millennium stresses localism and being part of the community as a defining factor between it and the nationwide DBS providers. Thus, the in market broadcast station is always going to be preferred and have an advantage in the negotiations: the cable provider needs that station. Unfortunately, the “need” to be on the smaller systems is a lot less for the broadcasters. Smaller cable companies typically are serving rural communities on the fringes of the DMA not the “name” cities in the DMA. Further the smaller cable company does not serve a big enough mass of customers for the for the risk of losing distribution to be really meaningful to the station, unless comparable alternative programming is available. Millennium’s experience is that the decision to drop the local

⁸ See; 47 CFR 76.92; 76 CFR 76.5.

DMA broadcast station is difficult even if the alternative station is within 35 miles, and even more difficult if the DMA station is available from the DBS providers. Thus, based on our experience, the granting of the ACA Petition is not going to result in the wide scale importation of distant signals but rather is going to have the desired effect of eliminating the monopolistic advantage and placing some restraint on the price to our customers. In addition, the DMA broadcast station can always assure itself of carriage by 1) choosing must carry or 2) making reasonable demands and truly allowing the market to determine the appropriate “price” of the signal because, as noted above, the cable operator’s preference is always going to be the within DMA signal, if the price is something the operator’s customers can afford.

II. THE GOOD FAITH NEGOTIATION REQUIREMENTS SHOULD PREVENT THIRD PARTIES FROM PROHIBITING THE NEGOTIATION OF RETRANSMISSION CONSENT.

As the ACA Petition notes, an increasingly common claim by affiliated broadcast stations is that their network affiliation agreement prohibits them from granting retransmission consent outside of their DMA. For example, in the Monroe v WGMT case, the NBC station outside the DMA, WGMT, was willing and in fact executed a retransmission consent agreement allowing carriage of their signal.⁹ NBC then became involved and reminded WGMT of language in their network affiliation agreement which prohibited WGMT from granting retransmission consent outside the DMA. Faced with the

⁹See, Monroe, Georgia Water and Gas Commission d/b/a Monroe Utilities Network v. Morris Network Inc., Owner of WMGT, Channel 41, Macon Georgia, et al, CSR Nos. 6237-C and 6254-C, Memorandum Opinion and Order, 2004 WL 1661042 (rel. July 27, 2004).

pressure from the powerful network, WGMT attempted to renege on the retransmission agreement, resulting in the complaint at the Commission and ultimate resolution by Media Bureau in favor of the cable operator.

Millennium has encountered the same issue in its negotiations – network affiliate stations becoming increasingly concerned about the networks coming down on any out-of-DMA retransmission consent. The broadcast networks are attempting to prohibit negotiation of retransmission consent even when the DMA station does not have the protection of the Exclusivity Rules and the out of DMA station desires such carriage and is willing to grant retransmission consent. As discussed in the ACA Petition, such restrictions violate the good faith negotiation provisions and the Commission should give clear direction that such prohibitions will not be tolerated, especially in cases involving smaller cable companies.¹⁰

III. THE COMMISSION SHOULD RENDER A DECISION PRIOR TO THE NEXT ROUND OF RETRANSMISSION CONSENT NEGOTIATIONS THIS FALL.

As noted, Millennium is extremely concerned about the next round of retransmission consent negotiations and the demands that smaller cable companies and their subscribers pay sharply higher retransmission consent fees. Broadcast stations are required to provide their retransmission consent/must carry elections by October 1, 2005. Millennium thus respectfully requests that the Commission grant the relief sought in the ACA

¹⁰ ACA Petition, pp. 13-17.

Petition in a timely manner, so as to be effective in the upcoming retransmission consent negotiations.

CONCLUSION

For the reasons set forth herein, Millennium strongly supports the relief requested by the ACA Petition and respectfully requests that such relief be granted in a timely manner so as to be effective in the next round of retransmission consent negotiations.

Respectfully Submitted,

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